AMERICAN MARITIME CONGRESS
Franklin Square, 1300 Eye Street, NW, Suite 250 West, Washington, DC 200053314

November 9,200 1

Defense Acquisition Regulations Council
Attn: Mr. Rick Layser
OUSD(AT&L) DP(DAR)
IMD 3C 132
3062 Defense Pentagon
Washington, DC 20301-3062

RE: DFARS Case 2000-D0 14 - Defense Federal Acquisition Regulation Supplement; Ocean Transportation by U.S.-Flag Vessels - Proposed Rule

Dear Mr. Layser:

On behalf of the American Maritime Congress and the Maritime Institute for Research and Industrial Development, maritime industry associations representing most U.S.-flag ship operating companies in both the international and domestic shipping trades, and our member companies, we are submitting comments on the proposed rule in DFARS Case 2000-D014.

We wish to begin by commending the Defense Acquisition Regulations (DAR) Council for re-applying U.S.- flag cargo preference to contracts at or below the simplified acquisition threshold ("threshold") for transportation' of supplies by sea. We do have several recommended changes to this proposed rule which will be covered later in our comments but which we believe are extremely important.

As the DAR Council is aware, the question of the application of cargo preference under acquisition reform has had a lengthy history. It is important, we believe, to place this proposed rule in the context of this history.

The U.S.-flag maritime industry has followed this issue closely since late 1993 when it became clear that the application of cargo preference might be restricted in the context of acquisition reform efforts then underway. We have steadfastly maintained that cargo preference is absolutely vital to the survival of the U.S.-flag fleet and the merchant marine manpower base it generates. If the United States is to keep a merchant marine under its flag - trained and ready to serve our nation's defense at any time - then waivers of cargo preference should be granted only on very rare occasions and in accord with the letter and the spirit of the U.S. cargo preference laws.

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With this in mind, the Congress, during consideration of the Federal Acquisition Streamlining Act of 1994, explicitly deleted every single proposed cargo preference waiver - and this legislation became law with no mention of cargo preference or any waivers of this long-standing pillar of national maritime policy. This, however, did not put the issue to rest, because in March 1995, in proposed FASA implementing regulations, cargo preference waivers for subcontracts for commercial items were listed using a last-minute general waiver clause in the law that never mentioned specific laws to be waived.

This triggered a five-year policy development phase of which this proposed rule is a key element of the eventual conclusion. During these five years, two major compromises were reached. The first was on May 1, 1996 when our industry, the Maritime Administration, and the Department of Defense agreed to a compromise under the aegis of the Administrator of the Office of Federal Procurement Policy, then Dr. Steven Kelman (TAB A). Two years later, in April 1998, a second compromise (TAB B) was reached, this time under the aegis of the Assistant Deputy Under Secretary of Defense (Transportation Policy) Ms. Mary Lou McHugh, which defined how the so-called "Kelman Compromise" was to be reflected in appropriate Federal Regulation.

During this same five-year period, the bipartisan Maritime Security Act of 1996 became law, with its Maritime Security Program (MSP) put in place; the Voluntary Intermodal Sealift Agreement (VISA) between the Defense Department, the Maritime Administration, and key sectors of the U.S. maritime industry was established as an ongoing operational framework; and the United States Transportation Command's Commanders in Chief and its component commanders gave renewed, strong emphasis on the role of the private-sector merchant marine in national defense planning and force projection. These three important developments have demonstrated concretely that cargo preference cannot simply be judged by the yardstick of acquisition reform; other, indeed preeminent, national security objectives are on the table whenever waivers of cargo preference are considered.

Our industry, therefore, was deeply troubled when, contrary to both compromises, against the strong advice of the Maritime Administration, and despite our industry's unanimous opposition, the final rule in DFARS Case 98-D014 (March 16, 2000) included the waiver of cargo preference for subcontracts below the threshold. In May 2000, both Ms. McHugh and the Commander in Chief of USTRANSCOM, General Charles T. Robertson, affirmed the absence of any legal authority to waive cargo preference below the threshold, stressed the importance of the US. Merchant Marine, and stated that they were recommending that the waivers be removed and the DEAR be modified to reflect this (TAB C). We were assured by DAR Council staff in July 2000 that these waivers would be addressed separately in DFARS Case 2000-D014.

This promise has been kept, and our industry is extremely pleased that cargo preference has been re-applied to contracts and subcontracts below the threshold. We are also pleased that contractors are required, within thirty days after each shipment, to send a copy of the ocean bill of lading to the Maritime Administration's Office of Cargo Preference which monitors compliance

with all cargo preference laws. This requirement should be strictly enforced as it currently provides the primary source of information to monitor compliance with the law that requires DOD-generated cargoes to move on US-flag vessels.

We do recommend several changes to this proposal rule. The first is the deletion of "Alternate III (XXX 2001)" that excludes the requirement for a contractor or subcontractor to provide a representation regarding ocean transportation with its final invoice. To begin, we would note that the "Alternate III" proposal is inconsistent with the application of cargo preference to contracts below the threshold, If the intent of this proposed rule is to maintain cargo for the U.S.-flag fleet, why should there be any diminution of reporting obligations incumbent on contractors to comply with this intent and the law itself. Even though the proposed rule states that this alternate version is consistent with existing Simplified Acquisition Procedures, we do not believe that this representation should be eliminated unless a more comprehensive system to monitor the application of cargo preference to all DOD-relevant acquisitions is established - which system we would certainly support. At present, the tracking of cargo preference compliance for DOD-generated cargoes depends, in fact, on whether the contractor chooses to provide shipping information and whether the contracting off&r decides to enforce it. Except for specific or anecdotal reports, there is no way to know exactly what cargoes are being lost to the U.S.-flag through non-compliance. Given the vast and diverse universe of DOD-generated cargoes, any measure that helps encourage compliance, as the existing representation does, should be maintained. These cargoes are too important to the economic viability of the US. Merchant Marine - and thus to DoD sealift through vessels and manpower - to weaken in any way the possibility of compliance with long-established national policy.

Furthermore, 'Alternate III" would delete not only the important representation that U.S.-flag vessels were used unless an approved waiver was provided by the contracting officer, but it would also remove the contracting officer's right to adjust the contract if there is unauthorized use of foreign-flag vessels. This is the only penalty immediately available to the contracting officer if U.S.-flag vessels are not used as required by law.

Similarly, the proposed rule removes the existing requirement (48 C.F.R.§247.572.1 (c)) that the contracting officer determine whether transportation by sea will be necessary as a result of a contract. The existing requirement also mandates certain important steps if unanticipated sea transport becomes necessary during performance of the contract, If this requirement is deleted, ocean transportation will be open to "gaming" to avoid the U.S. flag by "discovering" "unanticipated" ocean transportation after the contract is signed and underway. This kind of loophole for avoiding the intent of the law could rapidly widen into a four-lane highway to evade cargo preference, undoing the very beneficial step taken in this proposed rule to apply cargo preference below the simplified acquisition threshold.

Finally, the proposed rule (Subsection 246.573(a)(2)) would exempt contract solicitations below the threshold from the requirement for the contractor offering a bid to represent whether or not ocean transportation will be needed for supplies under the contract at hand. This representation provides a way to encourage cargo preference compliance on the "front end" of a contract where it is easiest to ensure compliance.

For all these reasons, we strongly urge that "Alternate III", the requirement to use "Alternate III" at 48 C.F.R.§247.573(b)(4), and Subsection 247.573(a)(2) all be dropped from the proposed rule. In this regard, we wish to associate ourselves emphatically with the comments of the Maritime Administration to the DAR Council made on October 23, 2001.

In conclusion, we want to express our appreciation to the DAR Council for its closing in this proposed rule of the very serious loophole that was in the March 2000 final rule. Without this action, the critical base of cargo available to U.S.-flag vessels - which must compete against fleets that pay little or no taxes, comply with far less stringent regulations and oversight, and often are state-owned or very heavily subsidized - will be severely eroded. But, as we have noted above, this cargo base will also be eroded if cargo preference compliance and enforcement are weakened through proposed "Alternate III" and other clauses which will facilitate the avoidance of cargo preference law. Our recommended changes to this proposed rule thus are extremely important.

Erosion of cargo for US-flag vessels is not just a question of dollars and cents in our nation's economy. It also would affect significantly the sealift assets necessary for our Armed Forces sealift, including vast intermodal capabilities, that DoD could only replicate at a highly prohibitive cost. And, it would affect the numbers of U.S. commercial fleet personnel available to crew U.S. Government sealift vessels for which billions of dollars have already been expended and which are vital to U.S. force projection.

Given the terrible events of September 1 I and the crucial long-term national war on terrorism to which the American people and their leaders and the U.S. Merchant Marine are firmly committed, this ability to project American power - with reliable assets under American control - is more important than ever.

We thank you for this opportunity to comment on the proposed rule. Please do not hesitate to contact us if you have any questions.

Sincerely yours,

Gloria Cataneo Tosi
President
American Maritime Congress

C. James Patti
President
Maritime Institute for Research
and Industrial Development

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL PROCUREMENT POLICY

May 1, 1996

MEMORANDUM FOR AGENCY SENIOR PROCUREMENT EXECUTIVES
AND THE DEPUTY UNDER SECRETARY OF DEFENSE
(ACQUISITION REFORM)

FROM: Steven Kelman
Administrator

SUBJECT : Waiver of Cargo Preference Laws for Subcontractors Under a Government Contract for Commercial Items

This memorandum clarifies the policy and intent of amendments to the Federal Acquisition Regulation (FAR), published in the Federal Register as a Final Rule on September 18, 1995, 60 Fed. Reg. 48231, and to amendments to the Defense Federal Acquisition Regulation Supplement (DFARS), published in the Federal Register as an Interim Final Rule (IFR) on November 30, 1995, 60 Fed. Reg. 61586 (collectively referred to as the "rule"). The relevant amendments waive requirements for the preference of U.S.-flag vessels required under the Cargo Preference Act of 1954 (1954 Act), 46 U.S.C. § 1241(b), and the cargo Preference Act of 1904 (1904 Act), 10 U.S.C. § 2631, when ocean transportation is required under a subcontract for the acquisition of commercial items or commercial components. This memo further explains the policy and objectives of the rule, cites examples of situations to which the rule does not apply, and announces FAR Council glans to jointly review the implementation of thio provision of the rule by the Federal Acquisition Regulatory Council (FAR Council) with the Maritime Administration (MARAD) over the nrxt year to assess the impact of the implementation of there provisions of the rulr.

A. Background

The Federal Acquisition Streamlining Act of 1994 (FASA), pub. L. No. 103-355, provides authorities that *streamline the* acquisition process and minimize burdensome Government-unique requirements. Amendments to the FAR and DFARS were made to encourage the acquisition of commercially available end items and components by Federal agencies *as* well as *contractore* and subcontractors at all levels. Included in these revisions were amendments which waive the provision8 requiring preference for U.S.-flag vessels when ocean transportation is required for. supplies purchased under a Government *contract.* These provisions *arc* the *following:*

-- FAR Subpart 12.504(a)(14) makes the 1954 Act, 46 U.S.C. § 1241(b), which requires preference for privately owned U.S.-flag vessels for 50% of the goods purchased by or for the Government, inapplicable to subcontracts at any tier for the purchase of commercial items or commercial components.

-- FAR Subpart 47.504(e) makes clear that the subcontracting waiver does not apply to grants-in-aid shipments, such as agricultural and food-aid shipments, to shipments covered under Export-Import Bank loans or guarantees, and to ● ◆[illegible]■♦□□♦□ under Government contracts or ● graemontc for ocean transportation services.

-- FAR Subpart 52.344-L provides that after May 1, 1996, a Contractor is no longer required to floudovn the FAR provision requiring compliance with the Cargo Preference Act □↗ 1954 ♦□ ● subcontractor for commercial items or commercial components at any tier.

-- DFARS Subpart 212.504(a)(14) makes the 1904 Act, 10 U.S.C. § 2631, which requires preference for U.S.-flag vessels for all goods purchased by or for DOD, inapplicable to ● ◆[illegible]■♦□ at mait ● r for the purchase of commercial items or commercial components.

-- DFARS Subpart 247.372-l provides that the 1904 Act does not apply to subcontracts far the acquisition of commercial items or commercial components when ocean transportation is ■□♦ the ● ubject of thr contract and when it is incidental to a contract for supplies, services or construction.

-- DFARS Subpart 247.572-t requires that subcontracts under Government contracts or agreements for the direct purchase of ocean transportation remain subject to the 1904 Act.

-- DFARS Subpart 252.247-7023 amends thr definition of "subcontractor" ● o that the term does not include a supplier, materialman, distributor, or vendor of commercial items or commercial components.

Subparts 12.504(a)(14), 47.504(e), 52.244-6, 212.504(a)(14), 247.572-1, and 252.247-7023 become effective on May 1, 1996. Over the past several months, inquiries have been received regarding the implementation of the rule and the potential impact in particular situations.

8. Policy

The purpose of the rule is to provide flexibility for contractors and subcontractors which require ocean transportation to supply the same manufactured goods both in the commercial

marketplace and to the United States Government (hereinafter "Government"). The primary intent Fe to avoid interferance with established commercial practices *of* contractors which subcontract for commercial component parts and which possess ● r+rbl&&ad commercial delivery systems relating to the mtp ply of those commercial compoNrnt parts. Where the contract□□ ☜■± subcontractor have an ● tabllahrd system to supply commercial component parts for both commercial and Government sales, the rule grantsthe ● ubeontractcr relief from the continuing requirement to segregate that portion Of the commercial component parts attributable to the Government contract.

The rule is intended, however, to have a limited impact an the carriage of Government cargoes by U. 6 .-flag carriers. Government contracting officers should encourage the use of U.S.-flag carriers for government contracts in furtherance *of the* government's policy supporting the U.S.-flag merchant marine. While the rule is intended to avoid disruption of commercial relationships and *delivery* systems for the procurement of commercial items, it is not intended to waive compliance with the Cargo Preference Laws for ocean cargos clearly destined for eventual military or government use.

The following ● ☜○□●□□ remain subjecttotheCargo Preference Laws:

- Shipments Of construction materials and commercial items transported *undu* a construction contract (versus a supplies contract);
- Commissary and exchange cargoes that may be transported outside of the Defense Transportation System (see Section 334, National Defense Author rition Act of 1996, Dub. L. No. 104-106);
- Contract Shipments *in* support *of* military contingencies, exercises, and U.S. forcer deployed in connection with United Nations or North *Atlantic* Treaty Organization peacekeeping missions;
- Non-commercial component parts.

Furthermore, the rule does not permit contractors toalter existing practices *to* avoid compliance with the Cargo Preference Laws *by* merely creating ● ubcontrrcting arrangements. For example, components and items may not be procured by the prime contractor FOB destination simply to● volb CargoPreference.

C. Review of the Rule by Government Agencies

The list of examples above is by no means exhaustive. More cases may arise which circumvent the intent to the rule.

Therefore, MARAD and other Government Agencies will review the application of the rule to decide how particular situations should be addressed and to establish policy guidelines for implementation. For example, relevant DOD decisions in specific situations and the resulting policy guidelines will be included in the Reference Set of the DOD Acquisition Deskbook.

MARAD is mandated by Congress to monitor *and* report on compliance with the Cargo Preference Laws. MARAD provides the Congress with information regarding programs that are not in compliance with the Preference Laws, and informs the companies and government contracting officers of the requirement that certain cargoes be shipped on U.S.-flag vessels. MARAD, in consultation with other agencies, will closely monitor the implementation of the rule. In addition, MARAD and other agencies will work together to streamline the reporting process to provide more real time information to facilitate MARAD's oversight duties and monitoring of the implementation of the rule. Requests for clarification *or* guidance should be directed to MARAD and the agency responsible for thm contract.

Finally, before May 1, 1997, MARAD and other Federal agencies will conduct a comprehensive review to assess the impact of the implementation of these provisions of the rule and take appropriate action at that time.

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON. DC 20301-3000

ACQUISITION AND TECHNOLOGY

0 2 APR 1998

MEMORANDUM FOR THE DIRECTOR. DEFENSE PROCUREMENT

SUBJECT: Cargo Preference Coverage in DFARS Subpart 247.5

Attached is a Defense Acquisition Regulation Supplement (DFARS) modification (Attachment I) which implements and clarifies the May 1, 1996, Office of Federal Procurement Policy (OFPP) memorandum (Attachment 2), which mitigated the potential impact of the Federal Acquisition Streamlining Act (FASA) on Cargo Preference laws. In accordance with the agreement reached during a July 22, 1997, White House meeting, the attached DFARS modification is submitted for DAR Council approval. This modification has been extensively coordinated within the Department of Defense (DoD) and Maritime Administration (MARAD) and has been carefully worded to reflect the agreement that was previously reached and incorporated in the Defense Acquisition Deskbook (Attachment 3).

On July 22, 1997, representatives from the DoD acquisition and transportation communities, United States Transportation Command, MARAD and the maritime industry met at the White House with Dr. Kelman and representatives from the National Economic Council to discuss the effects of the FASA on Cargo Preference laws. At this meeting it was agreed that language clarifying the OFPP memo would be placed in the Defense Acquisition Deskbook and that the DFARS would be amended to incorporate appropriate regulatory coverage. Subsequently, language clarifying the OFPP memo was drafted by this office and coordinated within DoD, MARAD, and the maritime industry and placed in the Defense Acquisition Deskbook on September 30, 1997. This language is a balance between the objectives of acquisition reform and DoD's support for the U.S.-flag maritime industry and the Voluntary Intermodal Sealift Agreement program as a readiness enhancer.

I appreciate your assistance in bringing this issue to a successful conclusion. My point of contact is Mr. Adam Yearwood, 697-7286.

Mary Lou McHugh
Assistant Deputy Under Secretary
(Transportation Policy)

Attachments:
As stated

cc: DCINC, USTRANSCOM

Proposed DFARS Revision

Subject: Cargo Preference Coverage in DFARS Subpart 247.5

I. Problem: Section 8003 of the Federal Acquisition Streamlining Act of 1994 (FASA) made inapplicable the requirement of the Cargo Preference Act to subcontracts at any tier for the purchase of commercial items or commercial components. Section 8003 was implemented in DFARS 247.572-1 (a) and 252.247-7024 (b). **However,** applicability of this exemption was limited by OFPP Memorandum of May 1, 1996, "Waiver of Cargo Preference Laws for Subcontractors Under a Government Contract for **Commercial Items."** A change to the DFARS *coverage* is needed to implement the OFPP policy memorandum.

IX. Recommendation: That DFARS coverage be modified as set forth in the attachment to this memorandum.

III. Discussion: The statutory preference for using **U.S.-flag vessels** for ocean transportation of **supplies for U.S.** armed forces is contained in the Cargo Preference Act of 1904 (10 U.S.C.263 1). Defense **contractors** and subcontractors are generally required to comply with **the Cargo Preference** Act **pursuant to DFARS** clauses specified in 247373. Although **the FASA-authorized exemption** from the Act **applies to commercial** items for eventual USC by DoD, the applicability of **this exemption** was limited by the memorandum issued by OFPP. The intent is to **avoid disruption of commercial relationships and** delivery **systems** for the procurement of commercial items and to **create** a limited **waiver of the** Cargo Preference Act

As explained in FAR12.501(b), **the requirement** for adding value is intended to preclude **establishment** of unusual contractual arrangements **solely** for the **purpose of** Government sales. The OFPP memorandum **points** out **that this rule** precludes contractors from altering **existing practices** by creating subcontracting arrangements merely to **avoid compliance with the** Cargo Preference Act Generally, therefore, a prime **contractor** does **not** add value where the **commercial** items or commercial components **merely are shipped directly from a subcontractor to DoD.** For example. components and items may not he **procured** by the prime contractor FOB Government **destination simply to avoid the Cargo Preference Act.** The **purpose** of the exemption **is** to provide **flexibility** for **contractors** and subcontractors that require ocean transportation to supply the same goads both in the **commercial** market **place** and to the United **States** Government. **The primary** intent is to avoid **interference** with established **commercial practices of** contractors **that subcontract** for commercial **items** or components from subcontractors **that** possess established **commercial delivery systems** relating **to the** supply of commercial **items** or components. Where **the** subcontractor supplies **commercial** items or **components** for both commercial **and** Government **sales**, the subcontractor is not required **to segregate commercial items** or components **attributable** to a Government contract.

ATTACHMENT 1

Proposed DFARS Change for
Waiver of Carp Preference Laws for Subcontractors Under a Government Contract for Commercial Items

Revisions to the current DFARS language have been made using line-in/line-out method. Additions are underlined and deletions have a line through the text.

The following DFARS sections are revised as follows:

DFARS 212.504 Applicability of Certain Laws To Subcontracts For The Acquisition of Commercial Items.

(a) The following laws arc not applicable to subcontracts at any tier for the acquisition of commercial items or commercial components:

(xxii} Effective May 1, 1996: IO U.S.C. 2631, Transportation of Supplies by Sea (but see 247.572- I for exceptions).

**********a*********,**

DFARS 247.572-1, Ocean Transportation Incidental To A Contract For Supplies, Services, Or Construction

(a) This subsection applies when ocean transportation is not the purpose of the contract. However, effective May 1, 1996, this subsection does not apply to subcontracts for the acquisition of commercial items or commercial components (see 212.504(a)(xxii)) except for example:

(1) items shipped in support of a prime contract for construction;
(2) items shipped in direct support of military contingencies, exercises, or U.S. forces deployed in peacekeeping missions;
(3) as is the case with all FASA-authorized subcontract exemptions, the prime contractor is reselling or distributing commercial items or components of the-subcontractor to the Government without "adding value." (Regarding the latter, see 4' U.S.C. 430(b)(3) and FAR 12.501(b));
(4) non-commercial component parts; or
(5) commissary and exchange cargo sent to outside of the Defense Transportation System pursuant to 10 U.S.C. 2643.

Generally, a prime contractor does not add value where the commercial items or commercial components merely are shipped directly from a subcontractor to DoD. For example, components and items may not be procured by the prime contractor FOB Government destination simply to avoid Cargo Preference.

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DFARS 252.247 - 7023, Transportation Of Supplies By Sea

(a) Definitions. As used in this clause ---

(5) Subcontractor means a supplier. materialman, distributor. or vendor at any level below the prime contractor whose contractual obligation to perform results from, or is conditioned upon, award of the prime contract and who is performing any part of the work or other requirement of the prime contract. However, effective May I, 1996, the term does not include a supplier, materialman, distributor, or vendor of commercial items or commercial components, except in the case of commercial items or commercial components identified in (6) (iii) below.

(6) Supplies means all property, except land and interests in land, that is clearly identifiable for eventual USC by or owned by the DoD at the time of transportation by sea.

****

(iii) With regard to a subcontract for a commercial item or commercial component, the following will be considered "supplies" for the purpose of this clause:

(1) items shipped in support of a prime contract for construction;

(2) items shipped in direct support of military contingencies, exercises, or U.S. forces deployed in peacekeeping missions;

(3) as is the case with all FASA-authorized subcontract exemptions, the prime contractor is reselling or distributing commercial items or components of the subcontractor to the Government without "adding value." (Regarding the latter, see 41 U.S.C. 430(b)(3) and FAR 12.501(b));

(4) non-commercial component parts; or

(5) commissary and exchange cargoes transported outside of the Defense Transportation System pursuant to 10 U.S.C. 2643.

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DFARS 252.247-7024, Notification Of Transportation *Of* Supplies By Sea

(b) The Contractor shall include this clause, including this paragraph (b), revised as necessary to reflect the relationship of the contracting parties, in all subcontracts hereunder, except (effective May 1.1996) subcontracts for the acquisition of commercial items or components other than identified in 247.7023(a)(6)(iii).

ATTACHMENT

Waiver of Cargo Preference Laws for Subcontractors under a **Government** Contract for Commercial Items

This clarifies policy regarding shipment of commercial items of commercial components by a subcontractor and the limited extent to which exemption from the cargo preference laws are applicable in tight of the memorandum Administrator, Office of Federal Procurement Policy (Of PP), May 1, 1996, same subject as above.

The statutory preference for using U.S-flag vessels for ocean transportation of supplies bought for U.S. armed forces is contained in the Cargo Preference Act of 1904 (10 U.S.C. 2631). Defense contractors and subcontractors are generally required to comply with the Cargo Preference Ad pursuant to the clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.247-7023 ('Transportation of Supplies by Sea") for supplies that are clearly identifiable for eventual use by or owned by the Department of Defense (DoD) at the time of transportation by sea. Pursuant to Section 8003 of the Federal Acquisition Streamlining Act of 1994 (FASA), this requirement of the Cargo Preference Ad and DFARS 252.247-7023 was made inapplicable to subcontracts at any tier for the Purchase of commercial items or commercial components.

Although the FASA-authorized exemption from this Act applies to commercial items purchased for eventual use by' DoD, the applicability of this exemption was limited by the memorandum issued by OFPP. The intent is to avoid disruption of commercial relationships and delivery systems for the procurement of commercial items and to create a very limited waiver of the Cargo Preference Laws, For example, the requirement of the Cargo Preference Act and DFARS 252.247-7023 to use U.S.-flag vessels shall apply for the shipment of commercial items *or* commercial components by a subcontractor in the following situations: (1) items shipped in support of a prime contract for construction; (2) commissary and exchange cargoes transported outside of the Defense Transportation System pursuant to 10 U.S.C. 2643; (3) shipments in direct support Of military contingencies, exercises, or forces deployed on peacekeeping missions and: (4) non-commercial component parts; and , (5) as is the case with all FASA-authorized subcontract exemptions, the prime contractor is reselling or distributing commercial items *or* components of the subcontractor to the Government without "adding value.' (Regarding the latter, see *41* U.S.C. 430(b)(3) and FAR 12.501 {b)).

As explained in FAR 12.501 (b), the requirement for adding value is intended to preclude establishment of unusual contractual arrangements solely for the purpose of Government sales. The OFPP memorandum points out that this rule precludes contractors from altering existing practices by creating subcontracting arrangements merely to avoid compliance with Cargo Preference laws. Generally, therefore, a prime contractor does not add value where the commercial items or commercial components merely are shipped directly from a subcontractor to DoD. For example, components and items may not be ***procured*** by the prime contractor FOB Government destination simply to avoid Cargo Preference.

The purpose of this FASA-authorized exemption is to provide flexibility for contractors and subcontractors which require ocean transportation to supply the same goods both in the commercial market place and to the United States Government. The primary intent is to avoid interference with established commercial practices of contractors which subcontract for commercial items or components from subcontractors that possess established commercial delivery systems relating to the supply of those commercial items or components. Where the subcontractor Supplies commercial items or components for both commercial and Government sales, the subcontractor is not required to segregate commercial items or components attributable to a Government contract.

Government officials, including contracting officers, should encourage 'he use of U.S.-flag carriers for Government contracts in furtherance of the Government's policy supporting the U.S.-flag merchant marine.

Finally, in accordance with DFARS 247.572-L subcontracts under Government contracts or agreements for ocean transportation services remain subject to the Cargo Preference Act.

EDITOR'S NOTE:

An amendment to the DFARS is being considered to incorporate appropriate regulatory coverage that reflects the May 1, 1996 OFPP Memorandum.

File Owner: William Mounts, ODUSD(AR)
Co-owner: Mr. H. F. Amerau, ADUSD(TP)

File Last Reviewed:

Lessons learned (e.g., Turkish Container incident) and questions and answers will be included.

OFFICE OF THE UNDER SECRETARY OF DEFENSE

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WASHINGTON, D C 20301-3000

ACQUISITION AND
TECHNOLOGY

29 MAY 1998

Ms. Gloria Tosi
Executive Director
American Maritime Congress
Franklin Square
1300 Eye Street, NW, Suite 250 West
Washington, DC 20005

Dear Gloria:

Thank you for your support of the proposed Defense Federal Acquisition Regulation Supplement (DFARS) modification concerning Cargo Preference Laws for Subcontractors that was recently forwarded to the Defense Acquisition Regulation Council. In response to your letter dated April 17, 1998, I would like to provide you with information that I trust will clarify the Department of Defense position regarding the Acquisition Reform Working Group (ARWG) proposal.

Dr. Gansler sent a letter dated March 16, 1998, to the National Defense Industrial Association regarding the ARWG proposals on furthering acquisition reform. Dr. Gansler stated in his letter that the Department of Defense (DoD) does not endorse any of the ARWG's specific proposals. Additionally, it is my understanding that the ARWG has proposed similar changes to the cargo preference laws in the past.

We have been assured by the office of the Director, Defense Procurement that they support the above mentioned DFARS language that reflects last year's agreement that was reached between DoD and industry on cargo preference. Additionally, we have been assured by, the office of the Deputy Under Secretary of Defense (Acquisition Reform) that they are aware of the ARWG's proposals and remain committed to the cargo preference agreement and the proposed DFARS modification.

The Department will continue to uphold DoD's policy to support cargo preference laws and I appreciate your bringing this matter to my attention.

Sincerely,

Mary Lou McHugh
Assistant Deputy Under Secretary
(Transportation Policy)

UNITED STATES TRANSPORTATION COMMAND
508 SCOTT DR
SCOTT AIR FORCE BASE IL 62225-5357

27 Mar 98

MEMORANDUM FOR ASSISTANT DEPUTY UNDER SECRETARY OF DEFENSE
(TRANSPORTATION POLICY)

FROM: TCDC

SUBJECT: Cargo Preference Policy (Your Memos, 27 February 1998 and 17 March 1998)

I. References

a. USTRANSCOM/TCCC Letter, 3 November 1997 (Atch 1).

b. USTRANSCOM/TCDC Memo, 29 November 1997 (Atch 2).

2. We have reviewed your most recent draft DFARS language and appreciate the changes that you made from *your previous* submission, based an my staff's comments. These changes will help ensure the long-term solvency of our strategic partnership with the U.S. Flag carrier industry as recognized in the recently issued Transportation Acquisition Policy.

3. In the references we commented on the DAD and requested your support, as well as clear guidance, concerning the Kelman memo and the relationship between the use of subcontractors and tk applicability of Cargo Preference Laws regarding "any item shipped by a subcontractor directly to DOD." However, in the spirit of cooperation, we arc now willing to concur with the draft language, which has been modified to better reflect the DAD. Further, we must all monitor the impact of the DAD/DFARS language, and, if our mobilization base in the commercial sector erodes, we must consider different language.

4. Additionally, in accordance with CFR Part 20 1.201-1, the language should be bracketed-in, not lined-in. We appreciate the opportunity to comment on the DFARS language. We stand ready to work with you on this critical strategic mobility readiness issue.

ROGER G. THOMPSON, JR.
Lieutenant General, U.S. Army
Deputy Commander in Chief

cc:
Director, Joint Staff

UNITED STATES TRANSPORTATION COMMAND
508 SCOTT DR
SCOTT AIR FORCE BASE, ILLINOIS 62225-5357

1 May 2000

The Honorable Clyde J. Hart, Jr.
Maritime Administrator
U.S. Department of Transportation
400 Seventh Street S.W.
Washington DC 20590

Dear Mr Hart Clyde -

Thank you for your 6 Apr 00 letter concerning implementation of cargo preference laws for DOD cargoes. As we've demonstrated many times over recent years, we view cargo preference as a central element to the long-term viability of the U.S. maritime industry.

Let me say at the outset that there has been no attempt to ignore or otherwise circumvent MARAD inputs on the proposed regulatory changes that you mentioned. To the contrary, we have worked within the DOD process, governed by the Defense Acquisition Regulations (DAR) Council, that affords the opportunity for input from all sectors, including industry and other government agencies. I can also assure you that we are doing everything within our power to ensure that support for the U.S. flag maritime industry is recognized within the defense acquisition community.

The Defense Federal Acquisition Regulation Supplement (DFARS) cases you cite address efforts by the DAR Council, as part of a larger acquisition streamlining effort, to revise DFARS Parts 212 and 247. Included among the many provisions affected are some, as you mentioned, that impact application of cargo preference laws. You are correct in stating that the 16 March 1999 Federal Register final rule retained an existing DFARS waiver (that had been in place since 1995) of the Cargo Preference Laws for certain subcontracts that do not exceed the simplified acquisition threshold.

At the time of that notice, WC advised DOD that we were worhng with MARAD in an effort to obtain additional information that would allow us to determine the impact of removing the existing waiver on both the U.S. flag industry and DOD shippers. Our staffs were unable to come up with any such data. On 12 Apr 00, WC subsequently advised DOD that since neither the 1904 nor the 1954 Cargo Preference Act expressly mentioned any dollar threshold, and absent compelling data to the contrary, the DFARS waivers for subcontracts should be removed

Throughout this process, we have been in verbal contact with your staff to ensure WC were aware of and sensitive to MARAD's concerns. At the same time, 1 know you appreciate the process in which we operate within DOD to bring acquisition issues to resolution, and we will continue to work with you on these issues of mutual interest.

Sincerely

Tony Robertson

CHARLES T. ROBERTSON, JR.
General, USAF
Commander in Chief

Attachment:
TCJ4-D Memo, 12 Apr 00

cc: ADUSD(TP)

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON DC 20301-3000

ACQUISITION AND
TECHNOLOGY

05 MAY 2003

Honorable Clyde J. Hart, Jr.
Administrator,
Maritime Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Mr. Hart:

Thank you for your recent letter requesting my assistance on the issue of removal of any waivers of the Cargo Preference Laws for subcontracts that do not exceed the simplified acquisition threshold.

Over the past four months the U.S. Transportation Command has attempted to obtain data on the volume of shipments below the $100K simplified acquisition threshold from MARAD and DoD Components. Unfortunately, there is no data available to determine the amount of cargo in question.

In view of the unavailability of pertinent data and the absence of statutory authority for an exemption of Cargo Preference below the simplified acquisition threshold, I have submitted the attached memorandum to the Director, Defense Acquisition Regulations Council. The memorandum recommends that the Defense Acquisition Regulation Supplement (DFARS) be modified to apply Cargo Preference provisions and clauses in solicitations and resultant contracts with an anticipated value at or below the simplified acquisition threshold.

Thank you again for your letter and for your support of national defense.

Sincerely,

Mary Lou McHugh
Assistant Deputy Under Secretary
(Transportation Policy)

cc: General Robertson

UNITED STATES TRANSPORTATION COMMAND
508 SCOTT DR
SCOTT AIR FORCE BASE, ILLINOIS 62225-5357

12 APR 2000

MEMORANDUM FOR ASSISTANT DEPUTY UNDER SECRETARY OF DEFENSE (TRANSPORTATION POLICY)

FROM: TCJ4-D

SUBJECT: Cargo Preference Coverage in Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 247.5 (OUSD/DP(DAR) Memo, 29 Nov 99)

1. This is a follow-up to our memorandum of 16 Feb 00 regarding Cargo (Atch 2).

2. We have attempted to obtain data on the volume of shipments below $100,000. However, neither MARAD nor DOD can provide any data telling us the amount of cargo in question. Absent such data, and after further review of the applicable statutes and FAR case background, we are prompted to revise the original recommendation put forth in our Feb memorandum.

3. Neither the 1904 Cargo preference act nor the 1954 Cargo Preference Act expressly mentions any dollar threshold for their application. FAR Case 98-604, which is in the final coordination stage, has eliminated the $100.030 threshold. Therefore, in keeping with our commitment to our strategic partners, we see no justification for retaining the $100,000 threshold for ocean transportation incidental to DOD contracts for supplies, construction, or services. We will continue our efforts to gather data. Should a significant impact on defense contractors surface, we will revisit the issue at that time.

4. Our POC is Ms. Barbara Fischer, TCJ4-AQ, DSN 576-6819.

FRANK P. WEBER
Deputy Director for Logistics
and Business Operations

Attachments:
1. OUSD/DP(DAR) Memo, 29 Nov 99
3. TCJ4-D Memo, 16 Feb 00